

BEFORE THE  
**Federal Communications Commission**  
WASHINGTON, D.C. 20554

ORIGINAL

ORIGINAL  
FILE

In the Matter of )  
 )  
Amendment of Section 73.202(b) )  
Table of Allotments, )  
FM Broadcast Stations, )  
(Scotland Neck and Pinetops, )  
North Carolina )

MM Docket No. 92-7

RM-7879

RECEIVED

MAY - 1 1992

To: Chief, Allocations Branch  
Mass Media Bureau

Federal Communications Commission  
Office of the Secretary

**MOTION TO STRIKE REPLY COMMENTS OF WYAL RADIO, INC.**

Radio Triangle East Company ("RTE"), by its attorneys, hereby moves to strike portions of the reply comments filed by WYAL Radio, Inc. ("WYAL") in the above-captioned proceeding.

In Scotland Neck and Pinetops, North Carolina, 7 FCC Rcd 654 (Alloc. Branch 1992) ("NPRM"), the Commission proposed to grant WYAL's petition to reallocate FM Channel 238A from Scotland Neck, North Carolina to Pinetops, North Carolina, and to upgrade station WWRT(FM) from Channel 238A to Channel 238C3. In its Comments, RTE showed that the community change proposed in the NPRM would not result in a preferential arrangement of allotments, because Pinetops is not sufficiently independent from the much larger, nearby community of Rocky Mount, North Carolina to merit a first local service preference.

In its Reply Comments, WYAL, the permittee of station WWRT(FM), attempted to respond to RTE's comments. Relying on

No. of Copies rec'd 213  
List A B C D E

assertions of fact contained in a Technical Statement that was attached to its Reply Comments, WYAL claimed "that the purported premise of [RTE's] comments -- that Pinetops is an adjacent suburb of Rocky Mount -- is a wholly inaccurate portrayal of that community." WYAL Reply Comments at 2.

As shown below, the factual assertions in the Technical Statement attached to WYAL's Reply Comments are completely unsupported by citations (to official records or otherwise) or by statements from persons in a position to have first hand knowledge of the propositions asserted. As a result, both the Technical Statement and WYAL's Reply Comments (to the significant extent that WYAL purports to rely on the unsupported assertions) should now be stricken.

#### **DISCUSSION**

In its Comments in this proceeding, RTE demonstrated that the proposed reallocation of FM Channel 238A from Scotland Neck to Pinetops would result in the removal of a channel from a rural community to one that is designed to provide service to the urbanized area of Rocky Mount, North Carolina. See RTE Comments at 2-3. RTE also showed that WYAL had failed to demonstrate compliance with any of the established factors the Commission will analyze in order to determine whether the proposed new community is sufficiently independent from the

nearby urbanized area to merit a first local service preference. Id. at 3-7. Indeed, it showed that statements contained in WYAL's petition for rule making cut strongly against a finding that Pinetops is "independent" from Rocky Mount. Id. at 6.

The Commission has held that where a proposed change in a station's community of license appears intended to enable a petitioner to serve an urbanized area, the proposed new community must be credited with all the aural services licensed to the nearby urbanized area. RTE Comments at 5 (citing Amendment of the Commission's Rules Regarding Modification of FM and TV Authorizations to Specify a New Community of License, 5 FCC Rcd 7094, 7097 and n.14 (1990) (further citations omitted) ("Community Change Reconsideration Order")). When Pinetops is credited with all of the aural services licensed to Rocky Mount, it is clear that the retention at Scotland Neck of that community's first local FM signal (and only local nighttime aural service) is to be preferred over the allocation of an additional FM station to Rocky Mount. Id. at 7-8.

In response to RTE's comments, WYAL ignored RTE's showing that Pinetops is insufficiently independent from Rocky Mount to merit a first local service preference. It rested its entire argument on a claim that because Pinetops is not

specifically located within the Rocky Mount Urbanized Area -- a fact that RTE acknowledged in its Comments -- the proposed relocation of station WWRT(FM) from Scotland Neck to Pinetops would not constitute relocation to an urbanized area. WYAL Reply Comments at 2-3.

WYAL is clearly wrong in its belief that the location of a proposed new community outside the boundaries of an urbanized area is determinative on the issue of whether that community is entitled to a local service preference. Whether a community is within an urbanized area is just one of three inquiries the Commission makes under the second criterion of its analysis to determine if a preference is unwarranted. See Community Change Reconsideration Order, 5 FCC Rcd at 7099 n.14.

Nevertheless, in its attempt to demonstrate the independence of Pinetops from Rocky Mount, and, thus, the eligibility of Pinetops for a first local service preference, WYAL has attempted to rely on completely unreliable statements of alleged fact. The Technical Statement attached to WYAL's Reply Comments was prepared by a consulting engineer from St. Simons Island, Georgia. In purporting to describe factors that render Pinetops, North Carolina both independent from Rocky Mount and eligible for a first local service preference, the engineer made the following statement and argument:

Pinetops, North Carolina, is a community for allotment purposes. Pinetops has a Mayor, five town Commissioners and a Town Administrator. The town has numerous businesses and local churches. Pinetops Library, a branch of the Edgecombe County library (not Rocky Mount) is located in the town. The town provides its own fire and police services. Pinetops is not located adjacent to the Rocky Mount Urbanized Area, and it, therefore, should not be credited with any of the local services attributable to the urbanized area of Rocky Mount. Pinetops is an independent community.

WYAL Reply Comments, Technial Statement at ¶ 5 (emphasis in original). This description was the basis for WYAL's claim that RTE had inaccurately portrayed the character of the community of Pinetops. See WYAL Reply Comments at 2.

The above-quoted language from WYAL's Technical Statement is completely unsupported. There are no citations, no copies of official records or publications, and no statements from Pinetops civic leaders or politicians to lend any credence to the factual assertions of WYAL's consulting engineer (much less the legal arguments the engineer advances). Moreover, WYAL failed completely to respond to RTE's showing that the factual materials contained in WYAL's petition for rule making -- namely the excerpt from a phone book that shows the Pinetops listings as part of a larger directory -- indicate that Pinetops is not the "independent"

community WYAL would have the Bureau believe it is. See RTE Comments at 6 (citing WYAL Petition for Rule Making at Exhibit A, p.2).

Under these circumstances, the Bureau should strike WYAL's unsupported claims about the "independence" or eligibility of Pinetops for allocation purposes from the record or this proceeding. It should conclude the WYAL has failed to demonstrate the independence of Pinetops from Rocky Mount for allocation purposes, and thus make the comparison between Scotland Neck and Rocky Mount.

#### **CONCLUSION**

In its Comments, RTE showed how the proposed reallocation of Channel 238A from Scotland Neck to Pinetops was, in reality, a reallocation from a rural community to the Rocky Mount Urbanized Area. The transmitter for the "Pinetops" station would be located just outside Rocky Mount and provide full coverage of the urbanized area; Rocky Mount has a population more than 30 times greater than Pinetops (at 48,977 vs. 1,514); and factual assertions regarding the "independence" of Pinetops that are contained in WYAL's own petition for rule making support the finding that Pinetops is not sufficiently independent from Rocky Mount to garner a first local service preference under the Commission's community of license change rules.

In its Reply Comments, WYAL has, in conjunction with its legally inadequate attempt to rebut RTE's showings, supplied and relied upon purported factual showings regarding Pinetops that are completely without foundation, and lacking in support by any person with first hand knowledge of the matters asserted. These showings (and WYAL's reliance thereon) must be stricken from the record of this proceeding. The Bureau should deny the proposal advanced in the NPRM as inconsistent with Section 1.420(i) of the Commission's rules.

Respectfully submitted,

RADIO TRIANGLE EAST COMPANY

By: 

Meredith S. Senter, Jr.  
Stephen D. Baruch

Leventhal, Senter & Lerman  
2000 K Street, N.W.  
Suite 600  
Washington, D.C. 20006-1809  
(202) 429-8970

May 1, 1992

Its Attorneys

**CERTIFICATE OF SERVICE**

I, Tamara L. Mariner, do hereby certify that a copy of the foregoing "Motion to Strike Reply Comments of WYAL Radio, Inc." was mailed, United States first-class postage prepaid, this 1st day of May 1992 to the following:

Mark J. Prak, Esq.  
Tharrington, Smith & Hargrove  
209 Fayetteville Street Mall  
P.O. Box 1151  
Raleigh, NC 27602  
Attorney for WYAL Radio, Inc.

  
Tamara L. Mariner